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July 25, 2014

Arizona Prosecuting Attorneys' Advisory Council
Attn: Ms. Elizabeth Ortiz, Executive Director
1951 West Camelback Road, Suite 202
Phoenix, AZ 85015
elizabeth.ortiz@apaac.az.gov

Re: Request for *amicus curiae* brief in *Barbara LaWall v. R.R. Robertson, L.L.C. et al.*, Arizona Court of Appeals no. 1 CA-CV 14-0367

Dear Ms. Ortiz:

Please accept this letter as my request, under APAAC's *Amicus Curiae* Policy, that APAAC file an *amicus curiae* brief supporting my office in this public-records case. This case arose out of a public-records request in which a Phoenix private-investigations firm, R3 Investigations, sought to obtain records related to every felony case prosecuted by the Pima County Attorney's Office ("PCAO") over nearly 12 years (a copy of the initial request received from R3 is enclosed).[1] Using these records, R3 Investigations markets reports that it calls "charging and sentencing analyses." An R3 customer (typically a criminal-defense attorney) can purchase from R3 a report containing data from allegedly similar prior cases (cases involving certain charges, a particular prosecutor or judge, etc.) The substantive information contained in these reports consists of public records extracted from a database maintained by R3 and populated by records it receives in response to public-records requests.

PCAO has never opposed providing these records to R3. Rather, PCAO responded that R3 is engaged in a commercial use of public records under A.R.S. § 39-121.03(D), because it uses public records to prepare documents containing portions of those records for sale. As such, PCAO explained, R3 must pay the additional statutory charges for commercial-purpose requests set forth in § 39-121.03(A). Otherwise, R3 would enjoy a subsidy at taxpayer expense—PCAO staff time expended producing the records would go unreimbursed, and records that have commercial value would go out for free.

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[1] R3 later submitted a second, more limited request, but never withdrew the first. Additionally, a Phoenix attorney later requested the same records R3 sought in the second request. The Phoenix attorney, however, has largely joined R3's arguments in the case, and the primary issue is R3's continuous use of records in its business.

Through counsel, R3 vigorously contested PCAO's position, arguing that its use falls under an exception from the "commercial purpose" definition for "the use of a public record as evidence or as research for evidence in an action in any judicial or quasi-judicial body." § 39-121.03(D). PCAO, believing this exception does not apply because R3's requests do not relate to any particular "action" and because its reports cannot be used as "evidence," filed a declaratory-relief action in Maricopa County Superior Court. PCAO has now appealed from an adverse summary-judgment ruling. The Opening Brief, filed July 23, 2014, is enclosed.

The primary question presented in this case—whether the continuous use of public records to prepare reports containing excerpts of those records for paying customers is a "commercial purpose"—is a purely legal one of statewide importance. R3's website, www.r3investigations.com, boasts: "Exclusive! Statewide charging and sentencing data analysis." It obtains records from a variety of sources, including the Maricopa County Attorney's Office. Thus, other prosecuting agencies in Arizona either have received, or are likely to receive, similar requests. Moreover, R3 seeks these records on an ongoing basis (quarterly, according to R3's initial request to PCAO), so any prosecuting agency receiving a request from R3 is likely to receive periodic requests—and spend the taxpayer resources responding to those requests—indefinitely.

Because this case presents a question that may affect prosecuting agencies statewide, APAAC's perspective via an *amicus curiae* brief would be uniquely beneficial to the case. Accordingly, I ask that APAAC file an *amicus curiae* brief in support of PCAO's position in this case. To assist APAAC in reviewing this request, I have enclosed copies of (1) our Opening Brief on appeal; (2) the ruling being appealed; and (3) R3's initial public-records request to PCAO. We anticipate briefing being complete no later than September 22, and perhaps earlier depending on the actual filing dates of the Answering Brief and Reply Brief. Though there is no express time provision in the appellate rules for *amicus curiae* briefs in the Court of Appeals, I believe that any *amicus curiae* briefs in this matter should be filed shortly after the Reply Brief to ensure full consideration by the Court before oral argument, if oral argument is granted. Therefore, I ask that this item be placed on the agenda for the July 29 APAAC Council Meeting.

Sincerely,

Barbara LaWall
Pima County Attorney

Enc.

ARIZONA COURT OF APPEALS
DIVISION ONE

Barbara LaWall, in her official capacity as Pima County Attorney, Appellant, vs. R.R. Robertson, L.L.C., an Arizona limited liability company, doing business as R3 Investigations; Richard R. Robertson; and Christopher Dupont, Appellees.	No. 1 CA-CV 14-0367 Maricopa County Superior Court Case No. CV2013-016013

APPELLANT'S OPENING BRIEF

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INTRODUCTION

¶1 This appeal concerns public records. But it is not about whether a document is a public record or whether a particular public record is subject to disclosure. Instead, it is about a more limited, and novel, legal question: who must pay when copies of vast stores of public records are sought by a business that will sell documents containing the records, or portions of them, to paying customers on an ongoing basis?

¶2 R3 Investigations (referred to in this brief, collectively with Appellees R.R. Robertson, L.L.C. and Richard R. Robertson, as "R3") uses public records related to criminal prosecution to prepare "sentencing analyses" for its customers, who pay a fee. In two separate public-records requests, it sought portions of nearly 12 years' worth of prosecution data from Pima County Attorney Barbara LaWall ("County Attorney"), intending to include those data in its database, which it perpetually mines to prepare sentencing analyses. Christopher Dupont ("Dupont"), an attorney who is counsel for a customer of R3's, subsequently sought some of the same records directly from the County Attorney, though for purposes avowedly more limited than R3's.

¶3 The County Attorney believes that R3's use is, as matter of law, a "commercial purpose" under the public-records laws because R3 "use[s] . . . public record[s] . . . for the purpose of producing a document containing all or part of the

copy, printout or photograph for sale." A.R.S. § 39-121.03(D). R3 and Dupont believe that each of their proposed uses of the data falls under an exception in the statutory definition of "commercial purpose": "use of a public record as evidence or as research for evidence in an action in any judicial or quasi-judicial body" is, under the statute, not a commercial purpose. § 39-121.03(D).

¶4 Properly characterizing the requests as commercial or noncommercial is important, not because it affects R3's or Dupont's ability to obtain the requested records, but because it impacts what they must pay for those records. Complying with public-records requests costs money, and the records themselves may have commercial value. In § 39-121.03, the Legislature recognized that taxpayers should bear those costs only if the proposed use is noncommercial. If a request is for a "commercial purpose," the party making the request must bear those costs. *See* § 39-121.03(A).

¶5 For the reasons discussed below, R3's use meets the statutory definition of "commercial purpose," and neither R3's use nor Dupont's use falls under the exception for use as "evidence or as research for evidence in an action in a judicial or quasi-judicial body."

STATEMENT OF THE CASE AND FACTS

A. R3 Investigations

¶6 R3 is a private-investigations business whose customers include criminal-defense attorneys and their clients. (ROA 15[1], ¶¶ 1, 7; ROA 30, ¶¶ 1, 7.) Among its services, it provides "charging and sentencing analysis" to customers. (ROA 15, ¶ 5; ROA 30, ¶ 5.) An R3 "charging and sentencing analysis" is a report containing data related to other criminal cases, which, according to R3, allows customers to "analyze plea offers, present arguments during settlement conferences, or address the sentencing judge." (ROA 30, ¶¶ 27-28; ROA 39, ¶¶ 1-2.) The report may also form a basis for additional research into public records or for interviews. (ROA 31, Exhibit A, at 7-8.)

¶7 To prepare its sentencing-analysis reports, R3 maintains a database of public records, from which it extracts a responsive subset of records when requested by a customer—those data are then "compiled into a report formatted to meet the specific needs of the [customer]." (ROA 30, ¶ 28; ROA 39, ¶ 2.) At the request of a customer, R3 might, for example, search its database for other cases involving particular charges, plea offers, prosecutors, judges, and so on, and then prepare a report listing the responsive information. (*See* ROA 16, Exhibit 1, ¶ 10; *see also* ROA 16, Exhibit 4; ROA 31, Exhibits B & C; ROA 41; ROA 42.) Customers, who

[1]"ROA" refers to the Clerk's Electronic Index of Record dated June 13, 2014.

"normally" pay for these sentencing-analysis reports, may then use the report "in whatever manner they deem most appropriate in defending their criminal cases." (ROA 30, ¶¶ 29-30; ROA 39, ¶¶ 3-4.)

¶8 In 2013, R3 submitted two public-records requests to the County Attorney, in each instance intending to use the requested records for the purpose of preparing sentencing analyses. (ROA 30, ¶ 31; ROA 39, ¶ 5.) In its October 17 request ("First Request"), R3 sought prosecution data from 25 different database fields for all felony cases over a period of nearly 12 years ("Felony Data"). (ROA 30, ¶ 32; ROA 39, ¶ 6.) Its subsequent request, dated December 9 ("Second Request"), covered the same time period but sought only data from cases involving at least one count of first-degree murder ("First-Degree Murder Data"). (ROA 30, ¶ 33, ROA 39, ¶ 7.) R3 also asserted that the Second Request, unlike the First Request, was made "on behalf of counsel for a client." (ROA 16, Exhibit 8; ROA 30, ¶ 33; ROA 39, ¶ 7.)

¶9 R3 asserted that each request was for a "noncommercial purpose" because the data would be used as "evidence or as research for evidence" as contemplated by what the parties have come to call the "Evidence Exception," the second sentence in § 39-121.03(D). (ROA 30, ¶ 34; ROA 39, ¶ 8.) But the record shows that R3 would not be using the data as evidence or as research for evidence in a judicial or quasi-judicial proceeding; neither request referred to a judicial or quasi-

judicial proceeding—pending or contemplated—to which it related (*see* ROA 23, Exhibits A, D, & F), and it is clear that R3 has no intention of limiting its use of either the Felony Data or First-Degree Murder Data to a particular proceeding or proceedings. (ROA 30, ¶ 36; ROA 39, ¶ 10.) Instead, R3 intends to retain the records in perpetuity to prepare sentencing-analysis reports for its customers, who can then use the reports in whatever manner they see fit. (ROA 30, ¶¶ 28-29, 31, 36; ROA 39, ¶¶ 2-3, 5, 10.)

¶10 The County Attorney responded in writing to both requests, noting her position that the requests were for a "commercial purpose," as that term is defined in § 39-121.03(D). (ROA 30, ¶ 42[2]; ROA 39, ¶ 16.) After counsel for R3 replied to the County Attorney's response to the First Request, the County Attorney filed the instant declaratory-relief action in the Superior Court to resolve the parties' dispute, later amending her Complaint to include the parties' dispute about the Second Request. (ROA 30, ¶ 43; ROA 39, ¶ 17.)

B. Christopher Dupont's Request

¶11 After the County Attorney filed the declaratory-relief action, attorney Christopher Dupont—who is the counsel for a customer of R3's referred to in the Second Request—submitted his own public-records request to the County

[2]By inadvertent error, the County Attorney's Statement of Facts included two paragraphs numbered 42. All references to ROA 30, ¶ 42 in this brief are to the second paragraph numbered 42.

Attorney, seeking the same records R3 had requested in the Second Request and contending, also based on the "Evidence Exception," that his request was for a noncommercial purpose. (ROA 30, ¶¶ 38, 40; ROA 45, ¶¶ 12, 14.) The County Attorney sought, in writing, additional information from Dupont to aid her in evaluating the purpose behind Dupont's request. (ROA 30, ¶ 42; ROA 45, ¶ 16; *see also* ROA 23, Exhibit G.) Dupont declined to provide the requested information, except to state generally that he had "retained a team [of] attorneys, legal support staff and experts to analyze the data for the purposes we intend." (ROA 29, Exhibit 5.) He also stated that he might "be a party to [an] application for attorney fees" if sought by R3. (ROA 29, Exhibit 5.) The County Attorney then sought—and obtained—leave of the Court to amend her Complaint to add Dupont as a party. (ROA 18, 20, 21.)

C. The Motions and Ruling Below

¶12 R3 moved for summary judgment, contending that, under the Evidence Exception, its requests were for a noncommercial purpose. (*See generally* ROA 17.) Dupont joined that motion. (ROA 27.) The County Attorney opposed it and cross-moved for summary judgment, contending that all three requests were, as a matter of law, for a commercial purpose. (*See generally* ROA 32.) The County Attorney's cross-motion initially applied to Dupont as well as R3, based on Dupont's assertion that his client had "entered into an hourly fee contract with R3

to make the request of the Pima County Attorney and to sort the data, once received, into a usable format." (ROA 29, Exhibit 1, ¶ 14.) But, when Dupont later avowed that he "[did] not intend to provide the list to R3" but rather "to other allied professionals to conduct a systemic processes analysis of the cases on the list" (ROA 45, at 3-4), the County Attorney withdrew her cross-motion as to Dupont only. (ROA 49.)

¶13 The trial court heard oral argument on R3's and Dupont's motion and the County Attorney's cross-motion as to R3. (ROA 52.) In a written ruling, the court granted the former and denied the latter. (ROA 53.) Recognizing that the applicable caselaw "is, to say the least, sparse," the court reasoned that it "[did] not appear" that R3 and Dupont sought records for a commercial purpose as that term is defined in the first sentence of § 39-121.03(D). (ROA 53, at 2.) The court also reasoned that the final sentence of that definition—the Evidence Exception—"adds further weight to defendants' argument." (ROA 53, at 2.) In doing so, the court concluded that the Evidence Exception did not apply only to pending actions and construed the word "evidence" "broadly, rather than cabining it to something admissible under the Rules of Evidence." (ROA 53, at 3.)

D. Attorney Fees, Judgment, and Appeal

¶14 R3 applied for attorney fees in the amount of $30,833.50, under A.R.S. § 39-121.02(B). (ROA 54.) The County Attorney—while not contesting the

reasonableness of the time expended or rates charged—opposed the request on the grounds that the legal issues presented in the case were novel and that the case did not implicate the right to access public records. (ROA 57.) The court granted the request in its entirety and, on May 2, 2014, entered Final Judgment in favor of R3 and Dupont. (ROA 59, 60, 63.) The County Attorney filed a Notice of Appeal that day. (ROA 64.)

E. This Court's Jurisdiction

¶15 The Superior Court's Final Judgment resolved all claims as to all parties and was "entered pursuant to Rule 54(c), Arizona Rules of Civil Procedure[,] because no further matters remain[ed] pending." (ROA 63, at 2:16-17.) The County Attorney timely filed her Notice of Appeal within 30 days after the Final Judgment's entry. (ROA 64.) *See* Ariz. R. Civ. App. P. 9(a). This Court has jurisdiction under A.R.S. § 12-2101(A)(1) (providing for appeal "[f]rom a final judgment entered in an action . . . commenced in a superior court . . ."); *see also* A.R.S. § 12-1837 (judgments entered in declaratory-relief actions reviewable "as other orders, judgments and decrees").[3]

[3]Though documentation of this is not in the record, after the County Attorney filed her Notice of Appeal, she provided the requested data to R3 and Dupont. This does not moot the appeal because a ruling from this Court on the parties' dispute will have practical effects on the parties. *Cf. Sandblom v. Corbin*, 125 Ariz. 178, 182, 608 P.2d 317, 321 (App. 1980) (noting a case becomes moot when something happens that "renders the relief sought either impossible or without practical effect on the parties to the action"). The parties continue to dispute the purpose of the

ISSUES PRESENTED FOR REVIEW

¶16 (1) Parties who use public records "for the purpose of producing a document containing all or part of the copy, printout, or photograph for sale" must pay certain statutory charges. R3 requested public records from the County Attorney, intending to use them to populate a database from which it would extract responsive data to compile into reports for paying customers. Did the trial court err in concluding that R3's requests were not for a "commercial purpose"?

¶17 (2) "[U]se of a public record as evidence or as research for evidence in an action in any judicial or quasi-judicial body" is not a commercial purpose. The public-records requests at issue in this case do not relate to a specific legal action, and R3 intends to use the records requested to prepare reports for its customers; those customers, in turn, may not use the reports as evidence in an action, but rather may use them in any manner they see fit. Did the trial court err in concluding that the Evidence Exception supports R3's and Dupont's arguments?

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requests, and a ruling from this Court on that issue affects both the future use of the records by R3 and Dupont, *see* A.R.S. § 39-121.03(C), and whether the County Attorney may seek reimbursement for the costs provided in § 39-121.03(A). Moreover, R3 has announced its intention to seek updates to the records sought in the First Request on a quarterly basis. (ROA 23, Exhibit A.)

STANDARD OF REVIEW

¶18 This is an appeal from a summary judgment involving questions of statutory interpretation. The parties do not dispute the material facts,[4] but rather only the legal conclusions to be drawn from the undisputed facts. The standard of review is de novo. *See, e.g.*, *Herman v. City of Tucson*, 197 Ariz. 430, 432, ¶ 5, 4 P.3d 973, 975 (App. 1999).

¶19 Because this case involves statutory interpretation, the principles of statutory construction apply. The Legislature expresses its intent through statutory language, which is "the best and most reliable index of a statute's meaning." *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991).[5] This language must be interpreted in context, *see Est. of Braden v. State*, 228 Ariz. 323, 325, ¶ 8, 266 P.3d 349, 351 (2011), giving meaning to each of its words, *see Bilke v. State*, 206 Ariz. 462, 464, ¶ 11, 80 P.3d 269, 271 (2003). It is a basic aim of statutory interpretation to construe the statute so that no language is superfluous. *E.g. Grand v. Nacchio*, 225 Ariz. 171, 175-76, ¶ 22, 236 P.3d 398, 402-03 (2010).

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[4]Because the County Attorney withdrew her cross-motion as to Dupont, further proceedings on remand will be necessary as to Dupont in the event this Court agrees with the County Attorney on appeal. But the facts material to the ruling being reviewed by this Court are not disputed.

[5]While courts sometimes look to legislative history in interpreting statutes, *e.g.*, *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 269, 872 P.2d 668, 673 (1994), the legislative history that the County Attorney has been able to locate on the commercial-purpose statute has been unhelpful.

ARGUMENT

1. R3, intending to use public records to populate a database from which it extracts responsive data to compile into reports for paying customers, seeks those records for a "commercial purpose." The trial court erred as a matter of law in ruling otherwise.

A. In A.R.S. § 39-121.03, the Legislature recognized that commercial use of public records should be allowed, but not subsidized by taxpayers.

¶20 Arizona law strongly favors access to public records, *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984), so much so that the statutes recognize a user's right to profit from commercial use of public records. But the Legislature made it clear in § 39-121.03 that commercial use of public records should not be subsidized by the taxpayers. Therefore, the commercial user must pay the public entity the cost of staff time expended to reproduce the requested records and the value of the records on the commercial market, in addition to paying for the copies themselves.[6]

(1) The statutory language.

¶21 "Commercial purpose" is defined in § 39-121.03(D):

> For the purposes of this section, "commercial purpose" means the use of a public record for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout or photograph for sale or the obtaining of names and addresses from

[6]Noncommercial requestors need only pay a fee for the copies themselves. A.R.S. § 39-121.01(D); 1986 Ariz. Op. Att'y Gen. 103, 108 (1986) ("[A] party requesting records for a non-commercial use may be charged a copying fee, but may not be charged the cost of searching for the records.")

> public records for the purpose of solicitation or the sale of names and addresses to another for the purpose of solicitation or for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record. Commercial purpose does not mean the use of a public record as evidence or as research for evidence in an action in any judicial or quasi-judicial body.

¶22 This Court, noting that the statutory definition is "somewhat lengthy and difficult to parse," broke the first sentence down into three sections. *Primary Consultants, L.L.C. v. Maricopa County Recorder*, 210 Ariz. 393, 399-400, ¶¶ 26-27, 111 P.3d 435, 441-42 (App. 2005). Adding the Evidence Exception to the current judicial construction of the first sentence, then, the statute breaks into four key provisions:[7]

[7]Because this case directly implicates the Use Clause, it is unnecessary for this Court to revisit *Primary Consultants*' construction of the statutory definition. But, in the event this Court were inclined to revisit *Primary Consultants*, the County Attorney notes that she respectfully disagrees with the Court's construction of the statutory definition. Though perhaps this Court's reading was more faithful to grammatical parallelism, the County Attorney believes the Legislature intended the first sentence to address three substantive categories—resale of public records, commercial use of names and addresses, and reasonably anticipated monetary gain from direct or indirect use of public records. It has long been, and remains, the rule in Arizona that legislative intent prevails over strict grammatical rules when the latter contradict the former. *See, e.g., Jones v. Santa Cruz County*, 72 Ariz. 374, 376-77, 236 P.2d 361, 363 (1951); *see also Watts v. Ariz. Dep't of Revenue*, 221 Ariz. 97, 102, ¶ 22, 210 P.3d 1268, 1273 (App. 2009). Thus, as Maricopa County contended in *Primary Consultants*, the County Attorney believes the "for any purpose . . ." phrase serves as a catch-all and does not solely modify the Sale Clause.

> For the purposes of this section, "commercial purpose" means
>
> **[1. The "Use Clause"]** the use of a public record for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout or photograph for sale or
>
> **[2. The "Obtaining Clause"]** the obtaining of names and addresses from public records for the purpose of solicitation or
>
> **[3. The "Sale Clause"]** the sale of names and addresses to another for the purpose of solicitation or for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record.
>
> **[4. The "Evidence Exception"]** Commercial purpose does not mean the use of a public record as evidence or as research for evidence in an action in any judicial or quasi-judicial body.

§ 39-121.03(D) (bracketed language and line breaks added). A request is for a "commercial purpose," then, if it falls under any one of the first three provisions—the Use Clause, the Obtaining Clause, or the Sale Clause. The Evidence Exception (addressed in Argument 2, below) provides an exception to the "commercial purpose" definition for certain requests that might fall under any of the first three provisions.

(2) Prior interpretations.

¶23 As the trial court recognized, § 39-121.03(D) has been the subject of relatively little judicial construction. Only two reported decisions—both issued by

panels of this Court—have construed the statutory definition. And neither one of those decisions addressed the portions of the statute at issue here, the Use Clause and the Evidence Exception.

¶24 *Star Publishing Co. v. Parks*, 178 Ariz. 604, 605, 875 P.2d 837, 838 (App. 1993), arose from a refusal by the Pima County Chief Medical Examiner to release autopsy reports to a newspaper publisher. In its brief opinion, this Court first addressed whether the privacy interests of the decedents' relatives outweighed the public interest in obtaining the records. *Id.* The Court concluded that the Medical Examiner had not made a specific-enough record regarding the harm of disclosure to justify withholding the records. *Id.*

¶25 This Court also, however, rejected the Medical Examiner's argument that the newspaper sought the reports for a commercial purpose. In doing so, the Court stated that the statute is "aimed at the direct economic exploitation of public records," not at "the use of information gathered from public records in one's trade or business." *Id.* Thus, the Court reasoned, selling a reproduction of a public record would be a commercial purpose, whereas "[l]earning facts from public records that might inform one in a daily occupation or might be newsworthy would not be a commercial purpose." *Id.* In reaching its holding, the Court recognized that the "direct or indirect use" language in the statute could be susceptible to a broader interpretation but rejected that interpretation as being inconsistent with the policy

favoring access and, because the case involved the press, raising "substantial constitutional questions." *Id.*

¶26 *Primary Consultants*, decided over a decade later, involved a request for voter records by a political consultant who "occasionally requests and uses voter records not on behalf of a particular client but to update research on election and voter data, trends, and records as part of his business." 210 Ariz. at 394, ¶ 2, 111 P.3d at 436. Maricopa County argued that the request was for a "commercial purpose," relying specifically on what it contended was a catch-all phrase in the statutory definition: "'any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record.'" *Id.* at 400, ¶ 27, 111 P.3d at 442 (quoting § 39-121.03(D)). The Court rejected that argument, reasoning that both the subsection's parallel structure and its use of the term "purchaser" suggested that the "direct or indirect use" language applies only to the Sale Clause—it is not, this Court held, a separate catch-all category. *Id.*

¶27 Importantly for purposes of this case, neither *Star Publishing* nor *Primary Consultants* directly addressed an argument that the requesting party's use fell under the Use Clause, nor that an otherwise commercial use was excepted by the Evidence Exception. *Star Publishing* involved newsgathering, and the Court's analysis made clear that it was not dealing with the "direct economic exploitation

of public records." 178 Ariz. at 605, 875 P.2d at 838. Indeed, this Court considered but rejected the possibility that the "direct or indirect use" language might apply to the newspaper's use in light of the public policy in favor of access to records and the "substantial constitutional questions" raised by applying that language to the press. *Id.*

¶28 And, in *Primary Consultants*, the parties had stipulated that the consultant's business consisted of "providing professional political consulting services for campaign-related activities to individuals considering political candidacy, candidates, or political campaign committees." 210 Ariz. at 400, ¶ 29, 111 P.3d at 442. This "[u]se of voter information for politically related purposes," this Court concluded, was "expressly excluded from the definition of commercial purpose" by A.R.S. § 16-168(E). *Primary Consultants*, 210 Ariz. at 400, ¶ 29, 111 P.3d at 442. That statute expressly allows for certain voter information to be used for political purposes and provides that use for the purposes allowed by the statute is not a commercial purpose. *See* § 16-168(E). This Court thus expressly declined to address Maricopa County's argument that "Primary Consultants [sold] the information it obtain[ed] to its clients." *Primary Consultants*, 210 Ariz. at 400, ¶ 29, 111 P.3d at 442. Accordingly, *Primary Consultants* too did not address the Use Clause.

¶29 Thus, as R3 conceded below (ROA 54, at 3; ROA 58, at 2), the question whether R3's use of the records it seeks falls under the "commercial purpose" definition is a novel one.

B. As a business that uses public records to compile documents it sells to customers for a fee, R3 uses those records for a "commercial purpose" under the Use Clause.

¶30 R3 does not dispute that, as part of its business, it searches, excerpts, and sorts public records and incorporates them into a report for paying customers. Examples of these analyses, included in the record on appeal (ROA 16, Exhibit 4; ROA 41; ROA 42), confirm this description. Because R3 compiles records into a usable format for a fee, its use squarely falls under the Use Clause—it engages in the "use of a public record . . . for the purpose of producing a document containing all or part of the copy, printout or photograph for sale." § 39-121.03(D). In the parlance of *Star Publishing*, it engages in the "direct economic exploitation of public records." 178 Ariz. at 605, 875 P.2d at 838.

¶31 In ruling to the contrary, the trial court relied "in particular" on *Primary Consultants*. But *Primary Consultants* sheds no light on how to interpret the Use Clause. As noted above, there this Court addressed the grammatical question whether the "direct or indirect use" clause applies only to the Sale Clause or constitutes a separate commercial-purpose category under § 39-121.03(D). In light

of § 16-168(E), the Court did not need to address whether Primary Consultants' use of voter records was covered by the Use Clause.

¶32 On the other hand, this case directly implicates the Use Clause. Unlike the situation in *Primary Consultants*, here there is no other statute saying that R3's use of public records is non-commercial, and here it falls under plain language of the Use Clause. The trial court therefore erred in relying on *Primary Consultants* to reach the conclusion that R3's requests were not for "commercial purpose."

¶33 Indeed, R3 did not rely on *Primary Consultants* in its briefing below, mentioning it only briefly in a Notice of Supplemental Authority and at oral argument. (ROA 50; Oral Argument Transcript, at 11-12.) R3's argument, instead, was that, at least in some cases, it does more research, in addition to compiling prosecution data for customers, and that this would somehow mean that R3's use of public records does not fall under the Use Clause. (ROA 33, at 3-4.) But this argument is inconsistent with the facts presented to the trial court and the applicable law.

¶34 As to the facts, the main example R3 provided in support of this argument—a 300-plus page report attached to the Cyrus Sentencing Memorandum—still consisted of public records. (ROA 42.) The difference between that report and, for example, the one attached to the Jakscht Sentencing Memorandum (ROA 16, Exhibit 4), is one of degree—the Cyrus Report includes the background court

filings (presentence reports and sentencing minute entries) from other criminal cases.[8] If R3, in some instances, prepares a report that includes more excerpted public records than it prepares in others, the report is still "a document containing all or part of the copy, printout or photograph for sale" under § 39-121.03(D).

¶35 Moreover, even if, in some instances, R3 both prepares a document excerpting public records for sale—a commercial purpose—and *also* does additional work constituting a noncommercial purpose, this does not render its entire use noncommercial. Indeed, the statute expressly provides that a person may not "obtain[] a public record for a noncommercial purpose and use[] or knowingly allow[] the use of such public record for a commercial purpose," or even use a record obtained for one commercial purpose for a different commercial purpose. § 39-121.03(C).

¶36 Because R3's continuous use of public records to prepare reports for paying customers falls squarely under the Use Clause, its requests were for "commercial purpose" as a matter of law, unless covered by the Evidence Exception. As explained below, the Evidence Exception does not apply.

[8]Similarly, the report attached to the Linsk Sentencing Memorandum (ROA 41) contained and summarized public records, albeit in memorandum and not tabular format.

2. Because R3's and Dupont's requests sought records to use without any tie to a judicial or quasi-judicial action, nor a legal basis for use as evidence in future actions, those requests do not fall under the Evidence Exception. To the extent the trial court relied on that Exception, it erred as a matter of law.

¶37 The Evidence Exception applies to "the use of a public record as evidence or research for evidence in an action in any judicial or quasi-judicial body." § 39-121.03(D). R3 and Dupont relied almost exclusively on the Evidence Exception in briefing and argument below. But to accept their argument is to distort the statutory language. According to them, records are "use[d] . . . in an action" even when there is *no action* at all, pending or contemplated. And, under their argument, "research for evidence" means *any use contemplated*, so long as it is theoretically possible that, in some future case, the product of the records might be submitted in some manner to a judge. By untethering the statute's application from its language, R3 and Dupont violate the cardinal principle of statutory construction that each word must be given meaning, so that no statutory language is rendered meaningless. *See, e.g, Bilke*, 206 Ariz. at 464, ¶ 11, 80 P.3d at 271.

A. The Evidence Exception does not apply to a party who seeks records that might—or might not—be used in any number of "future undetermined cases."

¶38 Neither R3's requests nor Dupont's request indicated the requesting party's intent to use the requested records as evidence in a specific judicial or quasi-judicial action, whether pending or contemplated. Indeed, R3 candidly admits that

it intends to store the requested records in a database in perpetuity to prepare sentencing analyses for any number of customers, who may then use the product "in whatever manner they deem most appropriate in defending their criminal cases." (ROA 30, ¶ 29; ROA 39, ¶ 3.) And Dupont's request, while apparently more narrow, was, as he avowed, for the purposes of preparing a study, without reference to any specific litigation, pending or contemplated. (ROA 30, ¶¶ 39-41; ROA 45, ¶¶ 13-15.)

¶39 The Legislature used the language "in an action" in conjunction with language providing that the records must be requested for "use . . . as evidence or as research for evidence." § 39-121.03(D). Records simply are not "use[d] . . . as evidence or as research for evidence in an action" when they are obtained without reference to any legal action.

¶40 And R3 would have this Court stretch the statutory language even further. It contends that the Evidence Exception applies to *its use*—that is, to hold the records for use in preparing reports for paying customers—based on how its *customers* might use its product in some "future undetermined case[]." (ROA 17, at 9 n.1.) But the focus in the commercial-purpose analysis is how the party requesting the records intends to use the documents, not how its customers might—or might not—use them in the future.

¶41 R3 responded to the County Attorney's assertion that the statute applies only to "pending actions" by suggesting that only statutes using the phrase "pending action" are so limited. (ROA 17, at 9.) But, as the County Attorney explained to the court below, the Legislature sometimes—as in § 39-121.03(D)—uses the phrase "an action" in a context that most logically suggests (or even requires) that it be interpreted to refer only to pending actions. For example:

- A.R.S. § 10-1814(A) allows a superior court to, "in an action by an investor, appoint a conservator or interim manager of [a close] corporation" under certain circumstances;
- A.R.S. § 11-454 provides that the constable or other person appointed by the court shall execute process "[w]hen the sheriff is a party to an action or proceeding";
- A.R.S. § 19-122(C) allows a court "in an action brought by any citizen" challenging an initiative or referendum petition, to enjoin public officers from placing the initiative or referendum on the ballot;
- A.R.S. § 20-487.04(B) allows the state director of insurance to "intervene in an action" brought by or on behalf of an insurer or policyholder under certain circumstances;
- A.R.S. § 22-261(C) allows parties "to an action" in justice court to request that proceedings be recorded;

- A.R.S. § 25-809(I) allows parties to "terminate an action" under parentage statutes by agreement only with court approval;
- A.R.S. § 28-3005(B) provides that a report to the Arizona Department of Transportation regarding a person's ability to safely operate a motor vehicle is generally subject to production "in an action";
- A.R.S. § 33-1365 allows tenant to raise landlord's noncompliance as counterclaim "[i]n an action" for possession or rent;
- A.R.S. § 38-262 allows the state or an injured party "in an action upon [an official] bond," to "suggest [a] defect in the bond, approval or filing";
- A.R.S. § 47-2723(A) provides the measure of damages when "an action based on anticipatory repudiation comes to trial before the time for performance."

¶42 But, in the end, by focusing exclusively on whether the action must be "pending," R3 fails to appreciate—as did the trial court—the true breadth of its argument. R3's position is not just that there need not be a *pending action* for the Evidence Exception to apply. It is that there need not even be an action *contemplated*. As explained above, this reading improperly reads the phrase "in an action" out of the statute, treating it as though it were superfluous. Yet, the basic rule of statutory construction precludes treating any statutory language as superfluous. *See Grand*, 225 Ariz. at 175-76, ¶ 22, 236 P.3d at 402-03.

B. The Evidence Exception applies only when the product of the records is admissible before a judicial or quasi-judicial body.

¶43 There is another, independent, reason that neither R3's requests nor Dupont's request fits under the Evidence Exception. The statutory exception requires that the records be used as "evidence or as research for evidence" before a judicial or quasi-judicial body. § 39-121.03(D). "Evidence," even if it is defined generically, means "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact." *Black's Law Dictionary* 595 (8th ed. 2004). As R3 and Dupont conceded below, to fall under the Evidence Exception, the use must "directly or indirectly tend to prove or disprove some fact relevant to an action before a 'judicial or quasi-judicial body.'" (ROA 17, at 10:13-14; *see also* ROA 27, at 1.)

¶44 But even under this broad standard, the records, or the product of research based on the records, must be something that the applicable body could consider with respect to a fact in issue. One cannot "use" something as "evidence or as research for evidence" if the applicable rules do not allow it to be considered as evidence.

¶45 Here, that would at a very minimum mean that comparative sentencing analysis would, in a criminal sentencing, have to have "any tendency to make a fact more or less probable than it would be without the evidence" if the fact is "of consequence in determining the action." Ariz. R. Evid. 401. Perhaps recognizing

this, R3 and Dupont argued below that prosecution records related to other actions *can* be relevant at sentencing in a criminal action, relying solely on the so-called "catch-all" mitigator in A.R.S. § 13-701(E)(6). That statute requires a sentencing judge to consider "[a]ny other factor that is relevant to *the defendant's character or background* or to *the nature or circumstances of the crime* that the court finds to be mitigating." § 13-701(E)(6) (emphasis added).

¶46 But the emphasized language defeats this relevance argument. Data showing how *other defendants* were sentenced for *other crimes* do not bear on the character of the criminal defendant charged nor on the circumstances of the crime that defendant is charged with committing.

¶47 But, R3 and Dupont contended below, the sentencing analyses prepared from public records have been submitted to, and even considered by, superior court judges in prior cases. This does not mean, however, that the sentencing analyses or the records used to compile them qualified as "evidence." Indeed, § 13-701(C) differentiates between "evidence" and "information" submitted to the sentencing judge, both of which may be considered by the sentencing judge. Yet § 39-121.03(D) specifically uses the narrower term "evidence," which must be given meaning. *See Bilke*, 206 Ariz. at 464, ¶ 11, 80 P.3d at 271. Because comparative sentencing analysis is not relevant to any *fact* in issue in sentencing, the use of public records to prepare comparative sentencing analyses qualifies, perhaps, as

"information" but not as "evidence" or "research for evidence." The Evidence Exception, therefore, does not apply.

CONCLUSION

¶48 R3 uses public records on a continuous basis to prepare sentencing-analysis reports that it sells to paying customers. Those reports may then be used by R3's paying customers in any manner they see fit. They might be used by those customers in any number of ways in the context of any number of future undetermined proceedings, or in no such proceedings whatsoever. R3 may use records obtained from the County Attorney for this commercial purpose, but it must compensate the County Attorney under § 39-121.03(A). The trial court erred as a matter of law in concluding otherwise. Accordingly, as to R3, the County Attorney respectfully requests that this Court:

- Vacate the summary judgment in R3's favor;
- Remand this case with directions to enter summary judgment in favor of the County Attorney; and
- Vacate the award of attorney fees in favor of R3.

¶49 Dupont's purpose for his request is less clear. As with R3, it is not limited to any particular judicial or quasi-judicial action, nor has Dupont offered any authority suggesting the requested records, or the product of research based on

those records, could be used as evidence in any contemplated action. Accordingly, as to Dupont, the County Attorney respectfully requests that this Court:

- Vacate the summary judgment in Dupont's favor; and
- Remand the case for further proceedings on whether Dupont's request was for "commercial purpose" under the Use Clause.

RESPECTFULLY SUBMITTED July 23, 2014.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

By: /s/ Andrew L. Flagg
Andrew L. Flagg
Deputy Pima County Attorney

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
04/02/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-016013 04/01/2014

HONORABLE MARK H. BRAIN

CLERK OF THE COURT
A. Melchert
Deputy

BARBARA LA WALL ANDREW FLAGG

v.

R R ROBERTSON L L C, et al. DANIEL C BARR

CHRISTOPHER B DUPONT

UNDER ADVISEMENT RULING

This matter came before the Court for argument on the parties' motions for summary judgment. Having fully considered the parties' papers and arguments, the Court concludes that defendants are entitled to summary judgment. Accordingly, defendants' motion is GRANTED and plaintiff's motion is DENIED. By way of brief explanation, the Court notes the following.

Defendants are gathering historical data regarding criminal cases in Arizona. They claim (and it appears undisputed) that they intend to use this information to compile reports so that individuals charged with crimes can evaluate plea offers and otherwise argue for less punitive sentences, under the notion that people who are similarly situated should be treated similarly. The parties agree that the records containing this data must be disclosed under the public records laws[1]—the question is how much plaintiff can charge defendants for the records under A.R.S. § 39-121.03, and that question hinges on whether defendants are using the records for a "commercial purpose." In that regard, § 39-121.03(D) provides:

> For purposes of this section, "commercial purpose" means the use of a public record for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout or photograph for sale or the

[1] There are limited exceptions; for example, defendants sought information regarding dates of birth, which are not producible. But the parties appear to have agreed on such matters, so the Court ignores them.

> obtaining of names and addresses from public records for the purpose of solicitation or for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record. Commercial purpose does not mean the use of a public record as evidence or as research for evidenced in an action in any judicial or quasi-judicial body.

The caselaw regarding this provision is, to say the least, sparse. In *Star Publishing Co. v. Parks*, 178 Ariz. 704, 875 P.2d 837 (App. 1994), the appellate court held that a newspaper was not seeking autopsy records for a commercial purpose:

> We believe this section to be aimed at the direct economic exploitation of public records not at the use of information gathered from public records in one's trade or business. Thus, the reproduction of a public report or a group of public records for sale as such would be a commercial purpose. Learning facts from public records that might inform one in a daily occupation or might be newsworthy would not be a commercial purpose. We recognize that the "direct or indirect use" portion of the final clause could permit a broader interpretation of commercial purpose. We reject that interpretation because it is inconsistent with the whole tenor of the public records statutes to make access freely available so that public criticism of governmental activity may be fostered and because imposing special fees on the press raises substantial constitutional questions.

Id. at 605, 875 P.2d at 838. Likewise, in *Primary Consultants LLC v. Maricopa County Recorder*, 210 Ariz. 393, 111 P.3d 435 (App. 2005), the appellate court parsed the meaning of subsection D (except the final sentence), and held:

> Accordingly, we conclude that the phrase "for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record" is not an independent catch-all phrase but modifies "the sale of names and addresses to another." Consequently, Primary Consultants' status as a for-profit business and its use of the voter information in furtherance of that business, although certainly a commercial use as that term may generally be understood, does not fall within the statutory definition of commercial purpose.

Id. at 400, 111 P.3d at 442.

From these cases (and *Primary Consultants* in particular), it does not appear that defendants are seeking the records for a commercial purpose as that term is used in the statute, even setting aside the final sentence of Subsection D. But that sentence adds further weight to defendants' argument. It provides, "Commercial purpose does not mean the use of a public

record as evidence or as research for evidence in an action in any judicial or quasi-judicial body." The Court agrees that nothing in this provision requires a currently pending case.[2] And, construing the word "evidence" broadly, rather than cabining it to something admissible under the Rules of Evidence, fosters the purpose of the statute (to make public records broadly available).

Effective April 15, 2014 new civil rules and forms are in effect for managing cases moving to trial. Be sure to review the new Civil Rules 16, 26, 37, 38, 72 through 74 and 77.

[2] And as noted during the oral argument, the Court thinks it disingenuous for plaintiff to argue that defendants should wait until they have a pending case and then request documents for just that case. Here, defendants are requesting a data-dump (and indicated that they would do so on a quarterly basis). It will undoubtedly be less work for plaintiff to gather the information once a quarter rather than responding to multiple requests for records.

Pima County Attorney's Office

PUBLIC RECORDS REQUEST / NON-COMMERCIAL PURPOSE

Date: Oct 17, 2013

Name of Requesting Party: Rich Robertson, R3 Investigations

I request that the Pima County Attorney's Office: ____ allow inspection of or X provide a copy or other reproduction of the following public records (please give detailed description. If known give the document name, page numbers, case name or number, or other pertinent information where applicable. Attach an additional 8.5" x 11" sheet, if needed.):

See attached letter

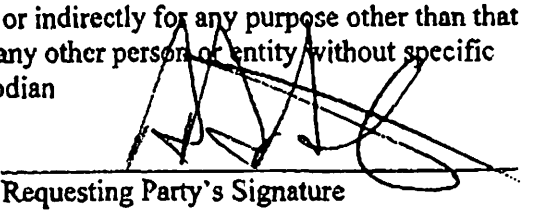
The records requested are to be used for (check one):

X Non-commercial purposes • • Commercial purposes

If the records are to be used for commercial purposes, please use the form titled **PUBLIC RECORDS REQUEST – COMMERCIAL PURPOSE.**

Certification

I certify that all the information provided is true and correct under penalty of perjury. I declare that I have read the Information and Instructions Pamphlet accompanying this form and understand its contents. I declare that the copies or reproductions of the public records which I have requested will be used solely for the purpose checked above. **Prior to obtaining copies of the documents requested, I agree to pay the fee assessed at the rate of $0.25 per page and $10.00 an hour for copying time. If I have requested information in other reproduction forms, I agree to pay the actual cost of the medium and the reproduction.** I certify that the copies or reproductions of the public records which I have requested will be used solely for non-commercial purposes. I certify that the copies or reproductions will not be used directly or indirectly for any purpose other than that described nor will I transmit or resell the records to any other person or entity without specific authorization of the County Attorney's records custodian



Requesting Party's Signature

DISCLAIMER – INDEMNIFICATION: The requesting party accepts responsibility for the requesting party's unauthorized use or transmission of any such data or information in its actual or altered form.

R³ INVESTIGATIONS

136 W. Main Street, Suite 102
Mesa, AZ 85201
www.R3Investigations.com

Office – 480.726.3961
Fax – 480.962.1513
AZDPS# 1003003

October 17, 2013

Barbara LaWall
Pima County Attorneys Office
32 N. Stone Avenue Ste 1400
Tucson, Arizona 85701
Via fax to 520-740-5495

Public Records Request – Charging/sentencing data

Dear Ms. LaWall:

Pursuant to A.R.S. § 39-121, *et seq*, The Arizona Public Records Law, I am seeking a copy of selected portions of your "register," in an electronic format (i.e. *.CSV, *.XLS, or equivalent) of all criminal cases prosecuted by your office that were initiated in calendar years 2002 through current.

As you know, A.R.S. § 11-532(A)(8) requires that all of the state's county attorneys "Keep a register of official business, and enter therein every action prosecuted, criminal or civil, and of the proceedings therein." In today's world, that "register" is undoubtedly maintained in an electronic format as a database.

The Arizona Supreme Court has held that when a public entity maintains a public record in an electronic format, the electronic version of the record is subject to disclosure. *Lake v. City of Phoenix*, 222 Ariz. 547, 218 P.3d 1004 (2009)

I am seeking inclusion of only those data fields that contain the following information:

- Superior Court Case number
- Defendant Name (first, middle, last)
- Defendant date of birth
- Defendant race
- Defendant gender
- Charged ARS Code
- Charged ARS Description
- Charged Class
- Defense Attorney
- Trial Judge
- Disposition Judge
- Sentencing Judge
- Disposition Type
- Disposition
- Disposition Date
- Disposition on ARS Code

R³ INVESTIGATIONS

- Police Agency Report Number
- Originating Police Agency
- Date Charged
- Trial/Disposition Prosecutor
- Sentencing Prosecutor
- Disposition ARS Description
- Disposition Class
- Sentence
- Consecutive/Concurrent

This request is for a non-commercial purpose as defined in A.R.S. § 39-121.03 (D) since this information will be used as evidence or as research for evidence in actions before judicial or quasi-judicial bodies.

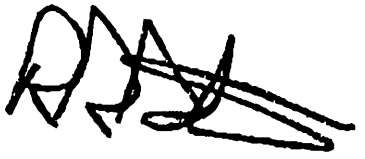
I will pay a reasonable fee for processing this request. If requested. I will also provide an electronic storage device with sufficient memory capacity (i.e. flash drive or CD) onto which you can duplicate the data.

If you believe this data should be withheld or disclosed in anything other than the electronic format, I request that you cite for me the basis of that decision and give me an opportunity to discuss that with you.

Please consider this request to be prospective. I anticipate seeking to update this data quarterly for an indeterminate period of time. Therefore, I request that you preserve whatever query is written to extract this information from your database.

Please contact me for any questions, concerns, to clarify terminology, or discuss reasonable fees at 480-726-3961 or rich@r3investigations.com

Sincerely,



Rich Robertson